

Internal Revenue Service

Department of the Treasury

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Person to Contact:

Telephone Number:

Refer Reply To:

CC:PSI:4 - PLR-135067-02

Date:

OCTOBER 01, 2002

Re:

LEGEND:

H	-
W	-
Trust	-
Company	-
Date 1	-
Year 1	-
Year 2	-
Year 3	-
A	-
B	-
m dollars	-
n dollars	-
p percent	-
x shares	-
accounting firm	-

Dear :

This is in response to your letter dated May 31, 2002, requesting an extension of time under § 301.9100-3 of the Procedure and Administration Regulations to make an allocation of generation-skipping transfer (GST) tax exemption. This letter responds to your request.

The facts and representations submitted are summarized as follows:

On Date 1, H established Trust, an irrevocable trust, for the benefit of H's minor children and their lineal descendants. The trustee of Trust is W.

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Paragraph 3.1 of Trust provides that until the trust is divided into shares under paragraph 3.2, the trustees may, in their discretion, pay all or any part of the income and principal to H's children and their issue. Income not so paid may be accumulated or added to principal.

Paragraph 3.2 of Trust provides that upon the first to occur of (i) the death of the survivor of W or H, or (ii) such time as the trustees decide to divide the trust property into shares under paragraphs 3.2, the trustees shall divide the trust property into as many equal shares as are necessary to allocate one share to each of H's children then living and one share to each of H's children not then living who leaves issue then living. The trustees are to deal with each child's share under paragraph 3.3.

Paragraph 3.3 of Trust provides that with respect to each share allocated to a child: (a) The trustees may pay all or any part of the income and principal of the share to the child and the child's issue. Any income not so paid may be accumulated or added to principal. (b) The child's share shall terminate, if not sooner terminated, upon the earlier to occur of (i) such time as none of the child and his or her issue is living and (ii) twenty-one years after the death of the last survivor of H, W, and H's children living on Date 1. Upon termination, the trustees shall pay the property of the child's share to the child's issue then living per stirpes, or if none is then living, in equal shares, one share to each of H's children who is then living and one share to the issue then living per stirpes of each of H's children who is not then living, but any distribution to a person who is then a beneficiary of a share of this trust shall be added to and dealt with as part of that share. It is represented that no distributions have been made from Trust.

Paragraphs 6.4(a) of Trust provides that no contributor to the trust shall serve as a trustee.

Trust was drafted by A, an attorney specializing in estate planning, on recommendation from H's and W's personal attorney, B. At the time Trust was established, H was the p percent shareholder in Company, a closely held company. On Date 1, H transferred x shares of common stock of Company to Trust.

For Year 1, H and W engaged accounting firm to prepare all of their tax returns, including their personal income tax returns, the trust income tax returns, and their respective gift tax returns. Accountant is an individual from the accounting firm who handled H's and W's account.

Accountant prepared a Form 709 (United States Gift (and Generation-Skipping Transfer) Tax Return) for H and W, reporting H's transfer to Trust in Year 1, and H's and W's consent to treat the transfer as made half by H and half by W under section 2513. On these returns, the x shares of Company stock were valued at \$m. No Notice of Allocation of GST exemption was filed with either of the gift tax returns.

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In August of Year 2, A reviewed H's and W's gift tax returns and discovered that accountant failed to allocate any GST exemption for the transfer in Year 1. H's and W's gift tax returns for Year 1 were examined in Year 3 by the Internal Revenue Service (IRS). Pursuant to the audit, H and W agreed to an adjustment in value of the Company stock gifted to Trust from \$m to \$n. The adjustment resulted in a gift tax deficiency for H and W which amount, plus interest, has been paid in full.

You have requested the following rulings: (1) that the Service grant an extension of time under section 2642(g) of the Internal Revenue Code and sections 301.9100-1 and 301.9100-3 to make allocations of H's and W's GST exemption under section 2642(b)(1); and (2) that such allocations are to be made based upon the value of the transferred assets to Trust as of Date 1, the date of the original transfer, as determined pursuant to audit as \$n.

Section 2501(a) of the Internal Revenue Code imposes a tax on the transfer of property by gift during each calendar year by any individual.

Section 2513(a)(1) provides that a gift made by one spouse to any person other than the donor's spouse shall, for purposes of chapter 12, be considered as made one-half by the donor and one-half by the donor's spouse, but only if at the time of the gift each spouse is a citizen or resident of the United States. Section 2513(a)(2) provides that "split gift" treatment under § 2513(a)(1) shall apply only if both spouses have signified their consent to the application of § 2513(a)(1) in the case of all such gifts during the calendar year by either spouse.

Section 2513(b)(2)(A) provides that the consent under § 2513(a)(2) may be signified at any time after the close of the calendar year in which the gift was made. The consent may not be signified after the 15th of April following the close of such year, unless before such 15th day no return has been filed for such year by either spouse, in which case the consent may not be signified after a return for such year is filed by either spouse. Thus, if a late return is filed, the consent must be made on the first return filed for such year.

Section 2601 imposes a tax on every generation-skipping transfer (GST). A GST is defined under § 2611(a) as (1) a taxable distribution, (2) a taxable termination, and (3) a direct skip.

Section 2602 provides that the amount of the tax is the taxable amount multiplied by the applicable rate. Section 2641(a) defines "applicable rate" as the product of the maximum federal estate tax rate and the inclusion ratio with respect to the transfer.

Under § 2642(a)(1), the inclusion ratio with any property transferred in a generation-skipping transfer is generally defined as the excess of 1 over the "applicable fraction." The applicable fraction, as defined in § 2642(a)(2), is a fraction, the

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numerator of which is the amount of GST exemption under § 2631 allocated to the trust (or to property transferred in a direct skip), and the denominator is the value of the property transferred to the trust or involved in the direct skip.

Section 2631(a) provides that, for purposes of determining the inclusion ratio, every individual shall be allowed a GST exemption of \$1,000,000 (adjusted for inflation under § 2631(c)) which may be allocated by such individual (or his executor) to any property with respect to which such individual is the transferor. Section 2631(b) provides that any allocation under § 2631(a), once made, shall be irrevocable.

Section 2632(a) provides that any allocation by an individual of his or her GST exemption under § 2631(a) may be made at any time on or before the date prescribed for filing the estate tax return for such individual's estate (determined with regard to extensions), regardless of whether such a return is required to be filed.

Section 26.2632-1(b)(2) of the Generation-skipping Transfer Tax Regulations provides that an allocation of GST exemption to property transferred during the transferor's lifetime, other than in a direct skip, is made on Form 709.

Section 2652(a)(2) provides that if, under § 2513, one-half of a gift is treated as made by an individual and one-half of such gift is treated as made by the individual's spouse, then such gift shall be so treated for GST tax purposes.

Section 2642(b)(1) provides that, except as provided in § 2642(f), if the allocation of the GST exemption to any transfers of property is made on a gift tax return filed on or before the date prescribed by § 6075(b) for such transfer or is deemed to be made under § 2632(b)(1) or (c)(1) the value of such property for purposes of § 2642(a) shall be its value as finally determined for purposes of chapter 12 (within the meaning of § 2001(f)(2)), or, in the case of an allocation deemed to have been made at the close of an estate tax inclusion period, its value at the time of the close of the estate tax inclusion period. Such allocation shall be effective on and after the date of such transfer, or, in the case of an allocation deemed to have been made at the close of an estate tax inclusion period, on and after the close of such estate tax inclusion period.

Section 2642(g)(1)(A) provides, generally, that the Secretary shall by regulation prescribe such circumstances and procedures under which extensions of time will be granted to make an allocation of GST exemption described in § 2642(b)(1) or (2), and an election under § 2632(b)(3) or (c)(5). Such regulations shall include procedures for requesting comparable relief with respect to transfers made before the date of the enactment of this paragraph.

Section 2642(g)(1)(B) provides that in determining whether to grant relief under this paragraph, the Secretary shall take into account all relevant circumstances, including evidence of intent contained in the trust instrument or instrument of transfer

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and such other factors as the Secretary deems relevant. For purposes of determining whether to grant relief, the time for making the allocation (or election) shall be treated as if not expressly prescribed by statute.

Section 301.9100-1(c) provides that the Commissioner has discretion to grant a reasonable extension of time under the rules set forth in §§ 301.9100-2 and 301.9100-3 to make a regulatory election, or a statutory election (but no more than 6 months except in the case of a taxpayer who is abroad), under all subtitles of the Internal Revenue Code except subtitles E, G, H, and I.

Section 301.9100-3 provides the standards used to determine whether to grant an extension of time to make an election whose due date is prescribed by a regulation (and not expressly provided by statute). Under section 301.9100-1(b), a regulatory election includes an election whose due date is prescribed by a notice published in the Internal Revenue Bulletin. Notice 2001-50, 2001-34 I.R.B.189, provides that taxpayers may seek an extension of time to make an allocation described in § 2642(b)(1) or (b)(2) or an election described in § 2632(b)(3) or (c)(5) under the provisions of § 301.9100-3.

In accordance with § 2642(g)(1)(B) and Notice 2001-50, taxpayers may seek an extension of time to make an allocation described in § 2642(b)(1) or (b)(2) or an election described in § 2632(b)(3) or (c)(5) under the provisions of § 301.9100-3.

Requests for relief under § 301.9100-3 will be granted when the taxpayer provides the evidence to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and that granting relief will not prejudice the interests of the government.

Section 301.9100-3(b)(1)(v) provides that a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer reasonably relied on a qualified tax professional, including a tax professional employed by the taxpayer, and the tax professional failed to make, or advise the taxpayer to make, the election.

Based on the facts submitted and the representations made, we conclude that the requirements of § 301.9100-3 have been satisfied. Therefore, H and W are granted an extension of time of 60 days from the date of this letter to make an allocation of H's and W's available GST exemption, with respect to H's transfer on Date 1 to the Trust of x shares of Company stock. The allocation will be effective as of Date 1, the date of the transfer to the Trust, and the value of the transfer to the Trust for gift tax purposes as determined pursuant to audit will be used in determining the amount of GST exemption to be allocated to the Trust.

The rulings contained in this letter are based upon information and representations submitted by the taxpayers and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of

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the material submitted in support of the request for rulings, it is subject to verification on examination.

Except as specifically ruled herein, we express or imply no opinion on the federal tax consequences of any aspect of any transaction or item discussed or referenced in this letter under the cited provisions or under any other provisions of the Code.

This ruling is directed only to the taxpayer(s) requesting it. Section 6110(k)(3) provides that it may not be used or cited as precedent. This election should be made on a supplemental Form 709, United States Gift (and Generation-Skipping Transfer) Tax Return, and filed with the Internal Revenue Service Center, Cincinnati, Ohio 45999. A copy of this letter should be attached to the supplemental Form 709. A copy is enclosed for this purpose.

Sincerely,

Heather Maloy
Associate Chief Counsel
(Passthroughs and Special Industries)

Enclosures

Copy for section 6110 purposes
Copy of this letter